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PR Docket No. 89-553

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GN Docket No. 93-252

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CHM, Inc. ("CHM") and CelSMeR, by their attorneys, respectfully submit this Supplement to the Reply to Opposition to Application for Review they jointly filed on January 11, 1996 ("Joint Reply"). At the time their Joint Reply was filed, neither CHM nor CelSMeR was aware of an unreported ex parte letter presentation made to the Chief, Commercial Wireless Division, that led the Wireless Telecommunications Bureau ("WTB") to adopt, on November 8, 1995, the procedurally defective Second Erratum in this proceeding.<sup>1</sup>

<sup>1</sup> The information was brought to light when RAM Mobile Data USA Limited Partnership ("RMD") filed its Reply to Pittencrief Communications, Inc.'s Opposition to Application for Review (the "RMD Reply") on January 11, 1996. This Supplement is being filed within thirty days of the information set forth in the RMD Reply.

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The Second Erratum substantially changed the language and completely reversed the meaning of Section 90.665(c) of the Rules, by eliminating the three-year/one-third construction benchmark for 900 MHz MTA licensees. The WTB took this action without the statutorily required notice and comment period, and without any rational basis in the record to justify such a substantive change. CHM and CelSMeR jointly filed an Application for Review which requested Commission rescission of the new rule adopted in the Second Erratum because of the failure of the WTB to follow procedures required by the Administrative Procedure Act ("APA").<sup>2</sup> Pittencrief Communications, Inc. ("PCI") filed its Opposition to the Applications for Review of CelSMeR/CHM and RMD on December 15, 1995, and the Joint Reply and RMD Reply were both filed on January 11, 1996.

RMD's Reply contained the startling revelation that, on November 3, 1995, Airwave West, Inc. and "other parties" that were not listed by name (collectively "Airwave Group"), delivered an ex parte letter to Rosalind K. Allen, (then) Chief, Commercial Wireless Division of the WTB, which threatened the filing in court of a request for stay of the upcoming 900 MHz auction unless the 900 MHz SMR coverage rule was changed "...to permit licensees ... to satisfy the FCC's coverage requirements through a 'substantial service' showing at any construction benchmark deadline."<sup>3</sup> The

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<sup>2</sup> RMD filed an Application for Review on similar grounds.

<sup>3</sup> "Request for Clarification of the Applicability of  
(continued...)"

Second Erratum, which provided exactly the relief requested *ex parte* by Airwave and its anonymous co-signers, was adopted five days later. The Letter Request was not filed with the Commission as an *ex parte* filing, and the existence of the Letter Request was not made public until some twenty days after the release of the Second Erratum.

The identity and interests of the Airwave Group are not revealed in the Letter Request, which was nothing more than a clandestine attempt to intimidate the WTB, filed with a reckless disregard for Commission rules. The Airwave Group attempts to couch the pleading as a relatively innocent request for clarification, but the true nature of the Letter Request is plainly visible upon a cursory examination of the Letter Request.

The Airwave Group initially asks for "confirmation" that the Third Order should be read to permit 900 MHz MTA licensees to use the "substantial service" criteria to satisfy both the proposed three-and five-year construction benchmarks. If such clarification is not forthcoming, then

Alternatively, we request that the Commission **reconsider** the [Third] Order either to include such a provision in its rules specifically or to eliminate the [Third] Order's prohibition against counting resale agreements toward the 900 MHz population coverage requirements.

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<sup>3</sup>(...continued)  
Substantial Showing Alternative for 900 MHz SMR MTA Licensees or, in the Alternative, Request for Reconsideration delivered to Rosalind K. Allen, Chief, Commercial Wireless Division, WTB on November 3, 1995 ("Letter Request") at pp. 3-4.

Letter Request at pp. 1-2. The Airwave Group again requested confirmation that their "interpretation" of the Third Order is correct, but alternatively asks the Commission to, pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429,

consider this filing as a request for reconsideration of the [Third] Order either to include an alternative three-year substantial showing provision specifically in the FCC's rules or to eliminate the Order's prohibition against counting resale agreements toward the 900 MHz population coverage requirements.

Letter Request at p. 3. Absent a favorable resolution prior to November 13, 1995, the Airwave Group threatened to file in court for a stay of the 900 MHz SMR auction,<sup>4</sup> stating:

In the event the FCC determines that it cannot resolve this issue prior to that date, Airwave West intends to request a stay of the upfront payment filing deadline and all other stages of the 900 MHz competitive bidding proceeding, in accordance with FCC Rule Section 1.429(k), 47 C.F.R. § 1.429(k), by submitting a Request for Stay in accordance with FCC Rule Section 1.44(e). 47 C.F.R. § 1.44(e).

Loading requirements and construction benchmarks were key issues in this proceeding and were addressed by commenters and petitioners following FCC procedures throughout this proceeding. The Airwave Group asked for more than a "clarification." The Letter Request asked the WTB to change the language (*i.e.*, the wording) of a rule the full Commission had adopted and demanded an

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<sup>4</sup> The Airwave Group claimed that its Letter Request was exempt from the *ex parte* rules because it provided information requested by the WTB. However, the WTB could not possibly have requested the Airwave Group to threaten to seek a stay of the auction. The Airwave Group had to know that its discussion of a stay request was not exempt, even if it innocently erred regarding the rest of its Letter Request.

immediate answer under the threat of a filing in court to stay the 900 MHz auction. The Airwave Group Airwave was well aware of § 1.429 of the Rules, and its Letter Request should have been filed with the Commission (not the WTB) within 30 days of Federal Register publication as a petition for reconsideration. Even though the Airwave Group twice made clear that its Letter Request was actually a petition/request for reconsideration pursuant to Section 1.429 of the Commission's Rules, the WTB did not treat it as such. Rather than allowing comment on the Airwave Group's proposals, the WTB merely adopted, by way of the Second Erratum, the Airwave Group's proposed reversal of the rules previously adopted in this proceeding. Errata are supposed to be released by agencies, on their own initiative, to correct minor typographical and non-substantive mistakes in adopted rules.

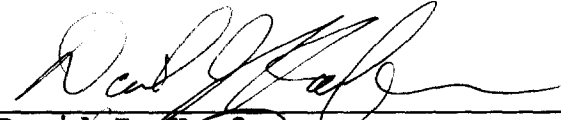
As the Applications for Review filed in this proceeding demonstrate, the Second Erratum was far more than "clerical" - - it promulgated a new rule and reversed the existing rule. CHM and CelSMER, in their Application for Review, questioned the WTB's motivation for adopting such sweeping changes to the rule "on its own motion." Given that only five days elapsed between delivery of the Letter Request to Ms. Allen, and the WTB's release of the Second Erratum adopting the Airwave Group's proposal, it is clear that the Second Erratum was issued based upon precisely the type of backdoor lobbying that the *ex parte* rules the notice and comment requirements of the APA are intended to prevent. CHM and CelSMER

urge the Commission to correct this egregious abuse of discretion on the part of the WTB, and rescind the Second Erratum immediately.

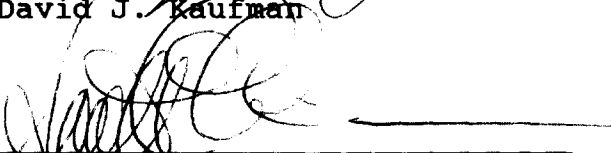
Respectfully submitted,

**CelsMeR and CHM, Inc.**

By:

  
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February 12, 1996

celsmer2.sup

**CERTIFICATE OF SERVICE**

I, JacLyn Freeman, a secretary at the law firm of Brown Nietert & Kaufman, Chartered, do hereby certify that I caused a copy of the foregoing "**Supplement to Reply to Opposition to Application for Review**" to be sent via first class U.S. mail, postage prepaid or hand delivered, this 12th day of February 1996 to each of the following:

- \* Chairman Reed E. Hundt  
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1919 M Street, N.W.  
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Washington, DC 20554
- \* Commissioner James H. Quello  
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- \* Commissioner Andrew C. Barrett  
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